

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

BECKLEY DIVISION

CARNIS DELP, et al.

Plaintiffs,

v.

CIVIL ACTION NO. 5:10-cv-00996

AMERICAN OPTICAL CORPORATION, et al.

Defendants.

MEMORANDUM OPINION AND ORDER

Pending is the Plaintiffs' Motion to Dismiss with Prejudice [Docket 25]. For the reasons set forth below, the motion is **GRANTED**.

In federal civil suits, the plaintiff has an absolute right to dismiss without prejudice up until the defendant answers the complaint or moves for summary judgment. Fed. R. Civ. P. 41(a)(1). Once the defendant has answered the complaint, however, dismissal is only be leave of court or upon stipulation of the parties. Fed. R. Civ. P. 41(a)(2); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 394 (1990). The purpose of this rule is to prevent voluntary dismissals that unfairly prejudice the adverse party. *See Clark v. Tansy*, 13 F.3d 1407, 1411 (10th Cir. 1993). In considering whether to grant a plaintiff's voluntary motion to dismiss, the Court will consider such factors as "the opposing party's effort and expense in preparing for trial, excessive delay and lack of diligence on the part of the movant, and insufficient explanation of the need for a voluntary dismissal,' as well as 'the present stage of litigation.'" *Miller v. Terramite Corp.*, 114 F. App'x 536, 539 (4th Cir. 2004) (unpublished) (quoting *Phillips USA, Inc. v. Allflex USA, Inc.*, 778 F.3d 354, 358 (10th Cir. 1996)).


The present case is in its infancy. Plaintiffs filed their state court complaint on April 21, 2010, and Defendants removed the case to this Court on August 6, 2010. Less than one month later, Plaintiffs filed their motion to dismiss. There is no evidence of excessive delay or lack of diligence in bringing the motion to dismiss. As indicated by Plaintiffs' motion, due to their age, they no longer wish to pursue their lawsuit against Defendants. Because Plaintiffs seek a dismissal with prejudice, Defendants will suffer no harm or prejudice to their case as a consequence.

For the foregoing reasons, Plaintiffs' Motion to Dismiss with Prejudice is **GRANTED**, and Plaintiffs' claims are dismissed with prejudice.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: September 21, 2010



THOMAS E. JOHNSTON
UNITED STATES DISTRICT JUDGE